ATTORNEY FOR APPELLANT:

ELIZABETH A. GABIG
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL SWEATT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0604-CR-303
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0412-MR-216344

June 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Michael Sweatt appeals from his convictions and sentences for Burglary, as a Class B felony; being a Serious Violent Felon in Possession of a Firearm, as a Class B felony; Carrying a Handgun Without a License, as a Class C felony; and being an Habitual Offender. Sweatt raises five issues for review, namely:

1. Whether the evidence is sufficient to support his convictions for burglary and being a serious violent felon in possession of a firearm.

2. Whether his conviction for possession of a firearm by a serious violent felon along with the elevation of his sentence on the burglary count violates Double Jeopardy principles.

3. Whether his sentence enhancement for being an habitual offender was proper.

4. Whether the trial court abused its discretion when it refused to allow certain alibi testimony.

5. Whether the trial court erred when it ordered enhanced sentences to be served consecutively.[1]

We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of November 29, 2004, Sweatt arrived at the apartment shared by Rochester Milam, III and Milam's father. The three drank beer and a fifth of gin brought by Sweatt. During the evening, Sweatt and Milam drove a female neighbor to Wal-Mart. The three rode in Sweatt's black Geo Metro, and, from the back seat, Milam saw Sweatt remove a .380 silver handgun from "his person somewhere" and put it in the glove compartment. Transcript at 136. The female neighbor went into the store by herself,

[1] On February 13, 2007, we granted Sweatt's request to file an amended brief and add this issue.

and, upon her return, Sweatt and Milam drove her back to her apartment. From there Sweatt and Milam drove to a bar to drink and watch football.

After the football game concluded, Sweatt and Milam left. While driving down Pendleton Pike in Marion County, they saw Jason Hamm alongside his broken down green Neon under the I-465 overpass. Despite not knowing Hamm, Sweatt and Milam stopped, unsuccessfully attempted to help Hamm with the car, and took Hamm to a gas station. Hamm phoned his friend, Fred Read, from the gas station. Read and Hamm had spent the evening together, and Read had watched Hamm from his own car. Read did not stop to help because he had believed the area was unsafe, and he did not approach after Sweatt and Milam stopped to help because he did not know Sweatt or Milam.

Sweatt, Milam, and Hamm drove back to Hamm's car, put gas in it, and again unsuccessfully attempted to start it. From there, they drove to a liquor store, where Sweatt bought beer, and then drove to Milam's apartment. While there, Hamm called Read again. Sweatt, Milam, and Hamm drank the beer and then drove to a nearby strip club. Sweatt and Hamm attempted to enter the club while Milam waited in the car. When Sweatt and Hamm were denied entry into the club, the three men left.

After driving around for a while, Sweatt stated that he knew of a house that they could "hit" to make some money. Transcript at 151. Milam and Hamm agreed, and Sweatt drove to the home of Kenneth Clarkson at 10907 Players Drive in Marion County. When Sweatt received no answer to his knock at the front door, Sweatt, Milam, and Hamm entered the garage. Milam and Hamm carried computer equipment from Clarkson's garage to Sweatt's car, and Sweatt entered the house. Milam then entered the

house through the garage and looked around. Milam saw Sweatt downstairs and went upstairs to explore.

When Milam heard someone else moving upstairs, he tried to go back downstairs, but Clarkson "grabbed" him. Appellant's Brief at 7. Milam asked to be released but was unable to get away. Milam then heard a gunshot from behind him. Clarkson released Milam, who fled out the front door. Milam ran to Sweatt's car, which was parked by the garage. Hamm was waiting in the front seat. At about the same time, Sweatt arrived at the car from the direction of the garage. Milam sat in the back seat, and Sweatt drove away. In the back seat, Milam saw DVD's that had not been in the car before they went to Clarkson's house. Milam asked what happened, and Sweatt said he intended to pull over so they could talk about it.

Sweatt drove for a while and eventually pulled the car over on a dark road. Milam exited the car and opened the door for Hamm to exit because the inside handle on the front passenger door was broken. Milam went to the back of the car to urinate, and Sweatt and Hamm went to the front of the car. Milam heard a gunshot and then saw Sweatt standing over Hamm.

Sweatt told Milam to get back in the car. After Milam and Sweatt re-entered the car, Milam saw a handgun on Sweatt's lap. Sweatt drove Milam back to his father's apartment. During the drive and at the apartment, Milam repeatedly asked Sweatt what happened, but Sweatt did not reply. Sweatt left the apartment a short time later.

The State charged Sweatt with murder, a felony; burglary, as a Class B felony; possession of a firearm by a serious violent felon ("SVF"), as a Class B felony; carrying a

handgun without a license, as a Class A misdemeanor; and being an habitual offender. After a trifurcated trial, the jury could not reach a verdict on the murder charge, but it found Sweatt guilty of burglary, as a Class B felony, and carrying a handgun without a license, as a Class C felony,[2] and found him to be an SVF in possession of a firearm and an habitual offender.

The trial court entered judgment of conviction for burglary, as a Class B felony; firearm possession by an SVF, as a Class B felony; and being an habitual offender.[3] On March 3, 2006, the court sentenced Sweatt to twenty years on the burglary count, enhanced by thirty years for being an habitual offender, and twenty years on the SVF count. The court then ordered those sentences to be served consecutively. The total aggregate sentence is seventy years. Sweatt now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

When reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor judge the credibility of witnesses. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). Rather, we consider only the evidence that is favorable to the judgment along with the reasonable inferences to be drawn therefrom to determine whether there was sufficient evidence of probative value to support a conviction. Id. We will affirm

[2] In the first phase of the trial, the jury found Sweatt guilty of carrying a handgun without a license, as a Class A misdemeanor. In the third phase, the jury found that Sweatt had previously been convicted of a felony, and, therefore, that his conviction for carrying a handgun without a license, as a Class A misdemeanor, was actually a Class C felony.

[3] The trial court "vacate[d]" the judgment of conviction as to carrying a handgun without a license, as a Class A misdemeanor and as a Class C felony, on the ground that those "merged" with the Serious Violent Felon count. Transcript at 772-73.

the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

Burglary

Sweatt contends that the evidence is insufficient to support his conviction for burglary. Specifically, he alleges that Milam's testimony was not credible and that Clarkson's description of the shooter did not match Sweatt's description, thus making the evidence insufficient to support his conviction. We cannot agree. To prove the offense of burglary, as a Class B felony, the State was required to show that Sweatt broke and entered the building or structure of another person with intent to commit a felony in it and either that the building or structure was a dwelling or that Sweatt was armed with a deadly weapon. See Ind. Code § 35-43-2-1(1)(A), (B) (West 2004).

Here, the evidence most favorable to the judgment shows that Sweatt asked Milam and Hamm if they wanted to "hit" a house to make some money. Transcript at 151. Sweatt then drove Milam and Hamm to the victim's residence, where Sweatt led the three into the garage. Milam carried a load of computer equipment from the garage to the car and then entered the house and explored upstairs. After he heard movement by someone else upstairs, Milam attempted to flee, but Clarkson grabbed him. Someone then fired shots, and Clarkson released Milam, who fled through the front door to the car. At about the same time, Sweatt returned to the car from the garage area. In the car, Milam saw DVD's that had not been there before Milam had entered the house.

The State showed that Sweatt planned to break and enter Clarkson's dwelling to take his property. Sweatt, Milam, and Hamm entered the residence, took computer equipment and DVD's, and then fled after the confrontation with Clarkson. We conclude that such evidence is sufficient to support Sweatt's conviction for burglary, as a Class B felony.

In support of his claim that the evidence is insufficient to support his conviction, Sweatt specifically argues that neither Milam's nor Clarkson's testimony proved that Sweatt had a handgun inside Clarkson's residence. But to convict Sweatt for burglary, as a Class B felony, the State was only required to show that either the building Sweatt entered was a dwelling or he possessed a firearm when he entered the building. The evidence is sufficient to show that the building he broke and entered was a dwelling. Thus, we need not determine here whether the evidence sufficiently proved that Sweatt also possessed a firearm during the burglary. Moreover, Sweatt's argument amounts to a request that we reweigh the evidence and judge the credibility of witnesses, which we cannot do. See Grim, 797 N.E.2d at 830. Thus, Sweatt's claim is without merit.

Serious Violent Felon

Sweatt next contends that the evidence is insufficient to support his conviction for firearm possession by an SVF. To prove that offense, as a Class B felony, the State was required to show that Sweatt was a serious violent felon and that he knowingly or intentionally possessed a firearm. See Ind. Code Ann. § 35-47-4-5(c). Sweatt contends the State did not prove beyond a reasonable doubt that he possessed a handgun. We cannot agree.

Milam testified that he saw Sweatt remove a handgun from "his person somewhere" and put it in the glove box of his car early on the evening of November 29. Transcript at 136. When Milam and Sweatt re-entered the car, Milam saw a handgun in Sweatt's lap. Sweatt contends that Milam's testimony "must be examined in light of all of the surrounding circumstances." Appellant's Brief at 12. Specifically, Sweatt notes that Milam faced murder charges for Hamm's death before Sweatt was arrested and that Milam's testimony against Sweatt was required under Milam's plea agreement. But, again, Sweatt's argument amounts to a request that we reweigh Milam's credibility, which we cannot do. See Grim, 797 N.E.2d at 830. We conclude that the evidence is sufficient to support Sweatt's conviction for firearm possession by an SVF.

Issue Two: Double Jeopardy

Sweatt next alleges that his conviction for firearm possession by an SVF and the elevation of the burglary count to a Class B felony violate Double Jeopardy principles. Specifically, Sweatt argues that the jury used the fact that Sweatt possessed a firearm to establish both an essential element of the SVF count and to elevate the burglary count to a Class B felony, violating the double jeopardy clause of the Indiana Constitution and common law double jeopardy principles. We address each contention in turn.

Indiana Constitution Double Jeopardy

Article I, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Indiana's Double Jeopardy Clause is violated if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to

establish the essential elements of a second challenged offense." Guyton v. State, 771 N.E.2d 1141, 1142 (Ind. 2002) (quoting Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999)). Under the "actual evidence" test in Richardson, "the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Id. (quoting Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)).

To show a double jeopardy violation under Article I, Section 14, a defendant must "establish not merely that it is possible that the jury used the same evidentiary facts to establish the essential elements of both offenses, but rather that the likelihood of this occurrence is sufficiently substantial for us to conclude that it is reasonably possible that this occurred." Russell v. State, 743 N.E.2d 269, 273-74 (Ind. 2001) (emphasis in original). To determine what facts were used, we consider the evidence, charging information, final jury instructions, and arguments of counsel. Goldsberry v. State, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

Sweatt argues that the Indiana Double Jeopardy Clause prohibits conviction for firearm possession by an SVF coupled with the elevation of the burglary count to a Class B felony. As noted above, to prove the offense of firearm possession by an SVF, as a Class B felony, the State was required to show that Sweatt was a serious violent felon and that he knowingly or intentionally possessed a firearm. See Ind. Code Ann. § 35-47-4-5(c). To prove burglary, as a Class C felony, the State was required to prove that Sweatt broke and entered a building or structure of another person with the intent to commit a felony. See Ind. Code § 35-43-2-1. The offense is elevated to a Class B felony if the

State shows either that it was committed while armed with a deadly weapon or that the building or structure was a dwelling. See Ind. Code § 35-43-2-1(1)(A), (B).

Here, the jury instructions and the verdict forms did not specify the particular occasion of firearm possession, nor did they specify whether the conviction for burglary, as a Class B felony, was based on the breaking and entering of a dwelling as opposed to the possession of a firearm. And Sweatt has not cited to any argument made by the State at trial that the convictions for burglary and firearm possession by an SVF were based on the same occasion of firearm possession. Again, to prevail on his constitutional double jeopardy claim, Sweatt had to show a reasonable possibility, not mere speculation or a remote possibility, that the jury used the same occasion of firearm possession to convict Sweatt of both charges. See Russell, 743 N.E.2d at 273-74. Sweatt has not met that burden. Thus, Sweatt's constitutional double jeopardy claim must fail.[4]

Common Law Double Jeopardy

Sweatt also contends that his SVF conviction and the elevation of his burglary conviction violate double jeopardy protection afforded under rules of statutory construction and the common law. Our supreme court has recognized a series of rules of statutory construction and common law that supplement the constitutional protections afforded by the Indiana Double Jeopardy Clause. Miller v. State, 790 N.E.2d 437, 439 (Ind. 2003) (citing Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002); Spivey v. State, 761 N.E.2d at 834). Pierce applied the rule that two crimes may not be enhanced by the same

[4] Because we determine that Sweatt has not shown a reasonable possibility that the jury used the same evidentiary fact to convict on both the SVF and enhanced robbery offenses, we need not address his assertion that the jury had only to find one essential element to convict on the SVF offense, namely, the "behavior" of possessing a firearm. But in that regard, we disagree with Sweatt's contention that his status as a serious violent felon was not an essential element to be proved by the State.

bodily injury. Pierce, 790 N.E.2d at 830. This was an application of the broader rule previously expressed by Justice Sullivan prohibiting conviction and punishment "for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished." Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring) (emphasis added). But the repeated use of a weapon to commit multiple separate crimes is not "the very same behavior" precluding its use to separately enhance the resulting convictions. Miller, 790 N.E.2d at 439. Rather, the use of a "single deadly weapon during the commission of separate offenses may enhance the level of each offense." Gates v. State, 759 N.E.2d 631, 633 n.2 (Ind. 2001).

Here, the evidence shows that Sweatt possessed a firearm on more than one occasion on the night in question. Milam testified that early on the evening of November 29, Sweatt removed a handgun from "his person somewhere" and put it in the glove compartment of Sweatt's car. Transcript at 136. Milam also testified that he saw a handgun on Sweatt's lap later that night, when he and Sweatt entered Sweatt's car immediately after Hamm was shot. As noted above, neither the jury instructions nor the jury forms indicate whether the jury convicted on the burglary count based on possession of a firearm or the breaking and entering of a dwelling. And even if we were to assume that the jury convicted Sweatt of burglary, as a Class B felony, based on his possession of a firearm, Sweatt has not shown that the jury used the very same behavior, namely, the same occasion of firearm possession, to establish the essential elements of both the SVF

offense and the elevation of the burglary count. See Russell, 743 N.E.2d at 273-74. Thus, his common law double jeopardy claim also must fail.

Issue Three: Habitual Offender Enhancement

Sweatt next contends that it was fundamental error for the trial court to enhance his sentence because a single offense was used both to convict him of the SVF offense and to adjudicate him as an habitual offender. To qualify as fundamental error, "an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Merritt v. State, 822 N.E.2d 642, 643 (Ind. Ct. App. 2005) (citation omitted). The fundamental error rule is extremely narrow and applies only when the record reveals clearly blatant violations of basic and elementary principles of due process, and the harm or potential for harm cannot be denied. Merritt, 822 N.E.2d at 644 (citations omitted).

In Gray v. State, 786 N.E.2d 804, 807 (Ind. Ct. App. 2003), trans. denied, post-conviction relief granted on other grounds, 841 N.E.2d 1210 (Ind. Ct. App. 2006), this court held that, in a case involving multiple convictions, no error occurs when an SVF conviction and an habitual offender determination are both based on the same underlying felony conviction but the habitual offender enhancement attaches to the sentence imposed on a third count. Here, Sweatt's SVF conviction and the habitual offender determination were both based in part on a 1994 rape conviction. But the trial court attached the habitual offender enhancement to the burglary count. Thus, under Gray, the trial court

did not err by using the same underlying felony for the SVF conviction and the habitual offender enhancement.[5]

Sweatt also contends that the imposition of consecutive sentences for the SVF and burglary counts is equivalent to attaching the habitual offender enhancement to the SVF count. Thus, he argues, the same underlying firearm possession was improperly used both for the SVF count and for the habitual offender sentence enhancement. But Sweatt does not support that contention with cogent argument. Thus, the issue is waived for review. See Ind. Appellate Rule 46(A)(8)(a).

Sweatt's arguments based on "analogous" case law are likewise unsuccessful. Appellant's Brief at 16. First, he contends:

> The statute prohibiting a person convicted of a serious violent felony from possessing a firearm[] includes within it language to enhance the act of possessing a firearm to a felony based on proof of the specific circumstance of a prior conviction of a serious violent felony. The habitual offender statute is more general and simply enhances the possible punishment based on any type of felony, not just the subset of serious violent felonies. When both a general and a specific statute address the same topic, the rules of statutory construction direct the more specific statute supersedes the general one. See Freeman v. State, 658 N.E.2d 68 (Ind. 1995); Sanders v. State, 466 N.E.2d 424, 428 (Ind. 1984).

Appellant's Brief at 17.

[5] Although we have determined that Sweatt's claim here fails, we understand his confusion based on Tate v. State, 835 N.E.2d 499 (Ind. Ct. App. 2005), trans. denied. In Tate, another panel of this court cited to Townsend v. State, 793 N.E.2d 1092, 1095 (Ind. Ct. App. 2003), trans. denied, as support for the contention that a defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a serious violent felon. Tate, 835 N.E.2d at 512. But the page citation in Tate references the Townsend court's discussion of the habitual offender statute before its amendment in 2001. The court in Townsend actually held the opposite, namely, that, under the habitual offender statute as amended, an enhancement under those circumstances is not error. Townsend, 793 N.E.2d at 1097.

Sweatt does not explain how or why that statutory construction rule applies on the facts of this case. Again, because he does not support that contention with cogent argument or citations to authority, he has waived that issue for appellate review. App. R. 46(A)(8)(a).

Sweatt next alleges that his "sentences for both SVF and the habitual offender enhancement also offend the Rule of Lenity." Appellant's Brief at 17. The Rule of Lenity "requires that 'criminal statutes be strictly construed against the [S]tate.'" Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005) (quoting Ellis v. State, 736 N.E.2d 731, 737 (Ind. 2000)). Apparently applying the Rule of Lenity, Sweatt asserts that "[i]n this case, as where there is any ambiguity, 'it must be resolved against the penalty . . . [.]" Appellant's Brief at 18 (citation omitted). But, yet again, Sweatt fails to support with cogent argument or citation to the record or authorities the contention that an ambiguity exists or how the Rule of Lenity applies here. As such, he has waived that argument for appellate review. App. R. 48(A)(8)(a).

Issue Four: Exclusion of Testimony

Sweatt contends that the trial court abused its discretion when it refused to allow alibi testimony by Shanita Goodman. A trial court has broad discretion in ruling on the admissibility of evidence, and absent an abuse of discretion, we will not disturb the trial court's decision. Schmid v. State, 804 N.E.2d 174, 181 (Ind. Ct. App. 2004), trans. denied. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. Further, a claim

of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. Id.

Here, Sweatt filed a belated notice of alibi defense on October 13, 2005, asserting that he was at the home of Mangwiro Sadiki-Yisrael on Euclid Avenue on the night of the burglary. Also on October 13, Sweatt filed his final list of witnesses, which named Yisrael, Matthew Ratliff, Joey Smith, and "[a]ny person on the State's witness list[.]" Appellant's App. at 115. The trial court granted Sweatt's belated motion to assert an alibi defense but ordered him to make the alibi witnesses available for deposition prior to an October 26 hearing.

The State first learned that Shanita Goodman was an alibi witness on the evening after the first day of trial, February 13, 2006. The following day of trial, outside the hearing of the jury, Sweatt made an offer of proof that Goodman would testify that she was at Yisrael's home overnight on November 29 through 30, 2004, with Yisrael and his wife and children; that Sweatt arrived at the home between two and two-thirty on the morning of November 30 and spent the night; and that on November 30 Sweatt helped Yisrael move property from Yisrael's former residence to his new residence.[6] The State objected to Goodman's testimony on the ground that Sweatt had known all along that Goodman was at the Euclid Avenue address on the night of the offenses but had never named her as a witness, alibi or otherwise, until after the trial had begun.

[6] Evidence of Sweatt touching items in Yisrael's garage on November 30 presumably would account for his fingerprints on those items, which were taken from Clarkson's home in the burglary on the night of November 29.

The trial court allowed Goodman to testify as to Sweatt's presence in Yisrael's garage on November 30 but did not allow her to give alibi testimony regarding Sweatt's presence at Yisrael's home. The court determined that Sweatt had known all along that Goodman was a possible alibi witness but that he had failed to name her until after the first day of trial. The court relied in part on Washington v. State, 840 N.E.2d 873 (Ind. Ct. App. 2006), trans. denied. There, this court stated that although the constitutional right to present defense witnesses "is of critical importance, it is not absolute and must sometimes yield to other legitimate interests in the criminal trial process." Id. at 880. The court also noted the purposes of the alibi statutes, including the desire to avoid the element of surprise and that the likelihood of government investigation following advanced notice discourages defendants from fabricating alibis. The court determined that Sweatt withheld Goodman's identity until trial had begun in order to gain a tactical advantage.

Sweatt argues that the trial court's reliance on Washington is misplaced because the legitimate State objectives for excluding a defendant's belated alibi evidence were not implicated in this case. Specifically, he states that he consistently asserted as his alibi that he was at the Euclid Avenue address on the night in question and the prosecution had ample time to investigate that alibi. But Sweatt ignores the fact that he failed to name Goodman until after trial had begun even though, on the facts presented, he would have known all along that she could have served as an alibi witness. Sweatt's reference in his witness list to any State witness does not suffice.

Again, the constitutional right to present defense witnesses is not absolute and must sometimes yield to other legitimate interests in the criminal trial process. Id. And Sweatt presented alibi testimony through Yisrael. On these facts, Sweatt has not shown that the trial court abused its discretion when it refused to allow alibi testimony by Goodman.

Issue Five: Consecutive Sentences

Finally, Sweatt contends that the trial court violated Indiana Code Section 35-50-2-1.3, the advisory sentencing statute,[7] when it imposed enhanced sentences to be served consecutively. Even though the trial court sentenced him in 2006, Sweatt committed his offenses in 2004, and the advisory sentence statute was not enacted until 2005. Thus, the advisory sentencing statute applies to Sweatt's sentence only if such application would result in a more lenient sentence under the doctrine of amelioration. But because one of

[7] The advisory sentencing statute, Indiana Code Section 35-50-2-1.3, provides:

> (a) For purposes of sections 3 through 7 of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.
> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
> (c) In imposing:
>
> (1) consecutive sentences in accordance with IC 35-50-1-2;
> (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
> (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
>
> a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Ind. Code § 35-50-2-1.3 (West Supp. 2006).

his convictions is for a "crime of violence" as defined by Indiana Code Section 35-50-1-2, the consecutive sentencing statute,[8] we need not reach that issue.

We granted Sweatt permission to amend his brief and add an argument based on the holding in Robertson v. State, 860 N.E.2d 621 (Ind. Ct. App. 2007), trans. granted. Robertson held that the advisory sentencing statute prohibited trial courts from deviating from the advisory sentence for any sentence ordered to run consecutively. Id. at 624-25. Since Sweatt filed his Amended Brief, however, our Supreme Court granted transfer in Robertson, vacating that decision.

Robertson expressly disagreed with White v. State, 849 N.E.2d 735 (Ind. Ct. App. 2006), trans. denied. The White opinion states, in pertinent part, as follows:

> [T]he advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the "appropriate advisory sentence" for an episode of non-violent criminal conduct. [The consecutive sentencing statute] in no other way limits the ability of a trial court to impose consecutive sentences. In turn, [the advisory sentencing statute], which references [the consecutive sentencing statute], imposes no additional restrictions on the ability of trial courts to impose consecutive sentences . . . .

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[8] Indiana Code Section 35-50-1-2 reads, in pertinent part:

> Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. . . . The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Ind. Code § 35-50-1-2(c) (West 2004).

Id. at 743. Four other panels of this court have recently adopted the reasoning in White and rejected the rationale of Robertson. See Barber v. State, 863 N.E.2d 1199, 1209-11 (Ind. Ct. App. 2007), trans. pending; Luhrsen v. State, 864 N.E.2d 452, 456-57 (Ind. Ct. App. 2007), trans. pending; Dixson v. State, 865 N.E.2d 704, 716-18 (Ind. Ct. App. 2007), trans. pending; Geiger v. State, __N.E.2d__, slip op. at 13-16 (Ind. Ct. App. May 23, 2007).

Regarding the construction of the advisory sentencing statute, we also follow White. "An appellate court must construe a statute according to its plain meaning." Woodward v. State, 798 N.E.2d 260, 262 (Ind. Ct. App. 2003) (quoting State v. Gibbs, 769 N.E.2d 594, 596 (Ind. Ct. App. 2002), trans. denied.), trans. denied. When the language of a statute is clear and unambiguous, it is not subject to judicial interpretation. Id. When the language is susceptible to more than one construction, we must construe the statute in accord with the apparent legislative intent by giving effect to the ordinary and plain meaning of the language used in the statute. Id. We look to the context of the statute, as well as related statutes, in order to divine legislative intent. See D'Paffo v. State, 778 N.E.2d 798, 800 (Ind. 2002) (citation omitted).

The plain language of the advisory sentencing statute directs trial courts to impose consecutive sentences "in accordance with [Indiana Code Section] 35-50-1-2," the consecutive sentencing statute. Ind. Code § 35-50-2-1.3(c)(1) (West Supp. 2006). The consecutive sentencing statute exhaustively defines "crime of violence," identifying the qualifying crime by name and citation. "[B]urglary as a Class A felony or a Class B felony (IC 35-43-2-1)" is identified in that list. Ind. Code § 35-50-1-2(a)(13) (West

2004). That statute also limits any sentence for convictions "arising out of an episode of criminal conduct" to "the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." Ind. Code § 35-50-1-2(c). But "[c]rimes of violence" are specifically excluded from that limitation. Id. In other words, the consecutive sentencing statute limitation applies only to non-violent crimes committed in the same criminal episode. White, 849 N.E.2d at 743. [9]

Sweatt's crime of burglary as a Class B felony is a crime of violence. Ind. Code § 35-50-1-2(a). Consequently, Sweatt's sentence for that crime is not affected by operation of the advisory sentencing statute, even though his other conviction is not a crime of violence. When a defendant is convicted for both a crime of violence and a crime not defined as a crime of violence, the consecutive sentencing statute limitation does not apply. Johnson v. State, 749 N.E.2d 1103, 1110 (Ind. 2001). Thus, we need not consider whether Sweatt's sentence is ameliorated by the operation of the advisory sentencing statute, and the trial court committed no error when it imposed enhanced consecutive sentences.

Conclusion

The evidence is sufficient to support Sweatt's convictions for burglary, as a Class B felony, and firearm possession by an SVF. Sweatt also has failed to show a double

[9] Although not effective until July 1, 2007, a recent amendment to the advisory sentencing statute appears to codify White's construction of that statute and serves as further evidence of the legislative intent. Specifically, the amended statute requires trial courts "to use the appropriate advisory sentence" when "impos[ing] . . . consecutive sentences for felony convictions that are not crimes of violence (as defined in IC 35-50-1-2(a)) arising out of an episode of criminal conduct, in accordance with IC 35-50-1-2 . . . ." Ind. Code § 35-50-2-1.3(c)(1), amended by Pub. L. No. 178-2007.

jeopardy violation because he has not shown a reasonable possibility that the jury used the same fact to establish both burglary, as a Class B felony, and firearm possession by an SVF. Similarly, the trial court did not commit fundamental error when it enhanced Sweatt's sentence based on an habitual offender finding. The trial court also did not abuse its discretion when it refused to allow Goodman to give alibi testimony. Finally, we hold that the advisory sentence statute does not apply to Sweatt's sentence because he committed a crime of violence, and, therefore, the trial court did not err when it imposed enhanced consecutive sentences.

Affirmed.

MAY, J., and MATHIAS, J., concur.